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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN DAVID WARD, Appellant.	)	2 CA-CR 2006-0429 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060927

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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P E R C U R I A M.

¶1 After a jury trial, appellant John Ward was convicted of a total of seventeen counts of armed robbery, aggravated robbery, attempted armed robbery, attempted aggravated robbery, and aggravated assault with a deadly weapon or dangerous instrument. The trial court sentenced him to concurrent, enhanced, presumptive prison terms, the longest of which was 10.5 years. On appeal, Ward argues the court erred by denying his motion for a judgment of acquittal on the counts of attempted armed robbery and attempted aggravated robbery pertaining to one of the victims and by admitting over Ward's hearsay objection a statement made by his codefendant. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Shortly after 1:00 a.m. on March 3, 2006, Ward and Alex Cota committed a series of robberies in the vicinity of the University of Arizona. Ward was driving a sport utility vehicle (SUV), and Cota was his passenger. Cota repeatedly got out, robbed nearby pedestrians at gunpoint, and then returned to the vehicle. During one of these incidents, Cota walked up behind S. and E. and demanded their money. He shoved S. against a fence, hit him with a gun, and demanded his wallet while pointing the gun at his head. S. complied, but Cota continued hitting him. Just as Cota looked at E., Ward pulled up in the SUV, Cota got in, and the two drove off.

¶3 After receiving a number of 911 calls from victims who described the SUV, police officers located and stopped the vehicle and ordered Ward and Cota to get out. The officers found a gun in the center console and one of S.'s credit cards on the floor in front of the driver's seat. They later also found in Ward's pockets other credit cards belonging to S. and one of the other victims, together with "lots of folded up money." Several victims were still in the vicinity, and officers brought them to the scene for a "show-up" identification. When Cota overheard on a police radio that one of the victims was unable to identify him, he yelled to Ward, "[S]ee[,] they can't identify us, they can't do anything." However, four other victims, including E., did identify Cota at the scene.

¶4 Cota entered into a plea agreement and thus avoided trial. A jury found Ward guilty as noted above.[1] After Ward admitted that he had been on probation at the time of the offenses, the court sentenced him to enhanced, presumptive prison terms, and this appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

[1]Ward was initially charged with seven counts of aggravated assault with a deadly weapon, five counts each of armed robbery and aggravated robbery, three counts each of attempted armed robbery and attempted aggravated robbery, and one count of possession of a deadly weapon by a prohibited possessor. The state subsequently amended one of the armed robbery and one of the aggravated robbery counts to attempted armed robbery and attempted aggravated robbery. At the state's request, the trial court dismissed two of the aggravated assault charges and one each of the armed robbery, aggravated robbery, attempted armed robbery, and attempted aggravated robbery counts, and severed the prohibited possessor count for trial.

Discussion

Sufficiency of the evidence

¶5 Ward first argues, "[N]o evidence was presented that there was an attempted armed robbery or aggravated robbery of . . . E[.]," and the trial court thus erred in denying his motion under Rule 20, Ariz. R. Crim. P., for a judgment of acquittal on those charges. We will not reverse a trial court's decision on a claim of insufficient evidence "if substantial evidence supports it." *State v. Panveno*, 196 Ariz. 332, ¶ 22, 996 P.2d 741, 744 (App. 1999).[2] "'Substantial evidence' exists if reasonable persons may fairly differ as to whether certain evidence establishes a fact in issue." *Id.*

¶6 "In Arizona, '[a] person commits robbery if in the course of taking any property of another . . . against [the other's] will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance.'" *State v. Benenati*, 203 Ariz. 235, ¶ 26, 52 P.3d 804, 811 (App. 2002), *quoting* A.R.S. § 13-1902(A). "The essential elements of an attempted robbery are (1) intent to commit robbery and (2) an overt act towards that commission." *State v. Clark*, 143 Ariz. 332, 334, 693 P.2d

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[2]The state's argument, relying on *State v. Whalen*, 192 Ariz. 103, 110-11, 961 P.2d 1051, 1058-59 (App. 1997), that Ward's Rule 20 motion was insufficient to preserve this issue on appeal, is without merit. In *Whalen*, we found a defendant waived his argument that the trial court had failed to grant a judgment of acquittal by not making a Rule 20 motion before the jury returned its verdict. *Id.* But here, Ward's counsel made such a motion immediately after the state had rested: "I move to dismiss . . . all of the counts in this case based on the fact that I don't think there is sufficient evidence linking Mr. Ward to actually committing any of these crimes or knowing of their commitment." This is all that Rule 20 requires.

987, 989 (App. 1984); *see* A.R.S. § 13-1001(A)(2).[3] Armed robbery is committed when the defendant or an accomplice is "armed with a deadly weapon," A.R.S. § 13-1904(A), and aggravated robbery is committed when the defendant is "aided by one or more accomplices actually present," A.R.S. § 13-1903. *See State v. Herrera*, 176 Ariz. 21, 27, 859 P.2d 131, 137 (1993); *State v. Comer*, 165 Ariz. 413, 420, 799 P.2d 333, 340 (1990).

¶7 E. testified that Cota "came up behind us and asked for money. . . he demanded it[:] Give me all of your money." She stated Cota then took a gun from his pocket and, using her "as a shield," hit S. with the gun and robbed him. Asked if Cota then turned his attention to her, she responded: "He was about to but then the two cars came . . . the SUV . . . and . . . probably a random car that scared them away." E.'s testimony, corroborated by S., was sufficient evidence for the jury to conclude that Cota's initial demand, "Give me all of your money," was directed at both E. and S. and that Cota intended to rob E. before he was interrupted by Ward's arrival. There was thus sufficient evidence for a jury to find that, "'under the circumstances [Cota] committed an overt act, took steps or did things that if not interrupted would have resulted in the commission of the crime.'" *State v. Dale*, 121 Ariz. 433, 434, 590 P.2d 1379, 1380 (1979) (demand for victim's wallet coupled with threat of violence sufficient for attempted robbery conviction), *quoting State*

[3]A defendant may also commit attempt under an accomplice theory by "[e]ngag[ing] in conduct intended to aid another to commit an offense, although the offense is not committed or attempted by the other person." § 13-1001(A)(3); *see State v. Wall*, 212 Ariz. 1, n.1, 126 P.3d 148, 149 n.1 (2006). But, because neither party relies on this subsection and we find Ward committed attempt pursuant to § 13-1001(A)(2), we do not consider it.

v. Mandel, 78 Ariz. 226, 228, 278 P.2d 413, 415 (1954). And Ward does not dispute that he was aided by Cota in committing the robbery or that Cota was armed with a deadly weapon. Thus, the court did not err in denying Ward's Rule 20 motion on the charges of the attempted aggravated robbery and attempted armed robbery of E.

Admission of codefendant's statements

¶8 Ward next argues that statements made by Cota during the "show-up" identification procedure should have been excluded as hearsay. We review a trial court's ruling admitting evidence over a hearsay objection for an abuse of discretion. *State v. King*, 212 Ariz. 372, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶9 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c); *see State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). The "matter asserted" referred to in the rule is the matter asserted by the out-of-court declarant, not by the party offering the evidence. """The key to the definition is that nothing is an assertion unless intended to be one."" *State v. Carrillo*, 156 Ariz. 120, 124, 750 P.2d 878, 882 (App. 1987), *vacated in part on other grounds*, 156 Ariz. 125, 750 P.2d 883 (1988), *quoting United States v. Zenni*, 492 F. Supp. 464, 468 (E.D. Ky. 1980), *quoting* Advisory Committee Note to Federal Evidence Rule 801(a).

¶10 As the court explained in *United States v. Long*, 905 F.2d 1572, 1580 (D.C. 1990), "One of the principal goals of the hearsay rule is to exclude declarations when their

veracity cannot be tested through cross-examination. When a declarant does not intend to communicate anything, however, his sincerity is not in question and the need for cross-examination is sharply diminished." Therefore, "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, . . . [is] excluded from the definition of hearsay." Advisory Committee Note to Federal Evidence Rule 801(a).

¶11 In line with such reasoning, this court has upheld the admission of out-of-court statements offered to prove a fact not intentionally communicated by the declarant but merely implied by the statement, finding that such statements are not hearsay. In *State v. Strong*, 178 Ariz. 507, 509, 875 P.2d 166, 168 (App. 1993), we found the statement of a drug dealer to an undercover police officer to "'say hi to Ricky'" was not hearsay for two reasons. First, it "was not intended as an assertion by the declarant that the person inside her house was named Ricky." *Id.* Second, "the statement was admissible to show the effect on the hearer, that is, how the officer first made contact with appellant that night." *Id.* In *Carrillo*, we reached a similar conclusion where a declarant was heard to say to someone on his end of the line during a telephone conversation, "Hector, don't do that now" or "Hector, we will do that later." 156 Ariz. at 124, 750 P.2d at 882. We found this statement was not hearsay when offered to show that someone named Hector was in the declarant's home at the time of the telephone call because the declarant was not intending to make such an assertion; rather, "he was attempting to make Hector stop doing something." *Id.*

¶12 In the present case, Officer Barry testified that Cota "yelled over to . . . Ward, see[,] they can't identify us, they can't do anything. They have got the wrong people." We agree with Ward that these statements "link[ed]" Ward and Cota and "gave the impression they were acting together." Indeed, this was apparently the very purpose for which they were offered. But, because Cota's intention in making the statements was to assure Ward that the police "[could not] do anything," and not to assert a connection with Ward, the statements were not hearsay when offered to prove such a connection. *See Strong*, 178 Ariz. at 509, 875 P.2d at 168; *Carrillo*, 156 Ariz. at 124, 750 P.2d at 882. The court did not err in admitting the statements over Ward's hearsay objection.

Disposition

¶13 For the reasons stated above, we affirm.

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge

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PHILIP G. ESPINOSA, Judge